



November 2, 2021

Patrick Chun
Director of Athletics
Washington State University
E: [Athletics.Director@wsu.edu](mailto: Athletics.Director@wsu.edu)
T: 509-335-0200

Re: Appeal of Written Notice of Intent to Terminate Nicholas Rolovich

Dear Mr. Chun:

As counsel for Nicholas Rolovich, Brian Fahling of the Law Office of Brian Fahling and Eric Kniffin of Lewis Roca submit this letter appeal of your Written Notice of Intent to Terminate him as Head Football Coach of the Washington State University Cougars.

While we are unclear on the standard WSU will use to review this appeal, we are using this opportunity to bring to your attention a myriad of procedural, legal, and constitutional infirmities in the manner which WSU handled Coach Rolovich's request for a religious exemption and its related intention to terminate his employment with the University, for "just cause."

This appeal is organized in three sections:

Section I provides relevant background information, including: Mr. Chun's reaction to Coach Rolovich telling him about his intention to request to a religious exemption from Governor Inslee's COVID-19 vaccine mandate as soon as one became available; Mr. Chun's actions to overturn Human Resource Services' ("HRS") decision that found Coach Rolovich had demonstrated a "sincerely held religious belief"; and his actions to overturn Environmental Health & Safety's (ER&S) recommendations for "interventions and countermeasures to ensure the safety of the employee and others the employee may be in contact with."

Section II summarizes some of the most obvious legal infirmities of the University's decision to deny Coach Rolovich a religious exemption because the University "questions the assertion that [his] sincerely held religious views conflict with the University's vaccine requirement."

Section III summarizes some of the most obvious legal infirmities of the University's decision that it would not accommodate Coach Rolovich's religious convictions, despite HRS' and EH&S' findings that the University could do safely.

An appeal of this sort is usually the employee's opportunity to restate his case and plead with his employer. But we see this appeal differently. This is your opportunity to take a step back, reexamine your illegal and unconstitutional conduct, and adopt a different posture toward Coach Rolovich before you and the University are forced to defend your conduct in the context of a federal court civil rights action.

We look forward to your response.

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I. BACKGROUND FACTS

This section provides factual background relevant to the University's October 18 decision to reject and in the alternative refuse to accommodate Coach Rolovich's request for a religious exemption from Washington's COVID-19 vaccine requirement, and its subsequent and related decision to terminate Coach Rolovich for "just cause."

The University's decision to deny Coach Rolovich's request for a religious exemption from Governor Inslee's vaccine mandate and its decision to fire him is related to its decision to take the same actions towards some of Coach Rolovich's assistant coaches, John Richardson, Ricky Loco, and Craig Stutzman, who are represented by undersigned counsel. As such, the legal arguments and background facts in those coaches' appeals are incorporated into Coach Rolovich's appeal by reference.

A. Mr. Chun Was Openly Hostile Toward Coach Rolovich's Religious and Scientific Objections to COVID-19 Vaccines.

Over the past year, Mr. Chun made a number of statements to Coach Rolovich that demonstrated his hostility toward Coach Rolovich's expressed religious and scientific reasons for refusing to receive a COVID vaccine. Mr. Chun even told Coach Rolovich that his request for a religious exemption would be denied and he would be fired unless he agreed to be vaccinated. The following summary is based on contemporaneous notes that Coach Rolovich made regarding these conversations.

On May 24, 2021, at approximately 3 p.m., at the request of Mr. Chun, a meeting was held regarding Coach Rolovich's previous statement to Mr. Chun that he was not planning to get the vaccine. Mr. Chun stated he was worried about Coach Rolovich's mental health and then accused Coach Rolovich of having extreme views regarding many issues. Coach Rolovich told Mr. Chun that the only thing he puts above the team is his faith and his family.

On May 27, 2021, Coach Rolovich was called to a 3 p.m. meeting at Mr. Chun's office. Mr. Chun told Coach Rolovich that the Coach's beliefs were making him incapable of leading his players. Mr. Chun also tried to get Coach Rolovich into counseling because he believed that the Coach had mental health issues. Mr. Chun offered his wife as someone the Coach could talk to because she had been in a couple different religions he referred to as "cults".

On August 16, 2021, Coach Rolovich was called to an urgent meeting at 5 p.m. with Mr. Chun and Deputy Director of Athletics, Bryan Blair. At this meeting, Coach Rolovich was told that Governor Inslee was intending to issue a new mandate that would eliminate the "personal exemption" from the coaching staff's declaration of vaccination status. Mr. Chun warned the Coach that any religious exemption request he submitted would be scrutinized to no end, and that Inslee's mandate would have a "high threshold" for religious exemptions moving forward.

Mr. Chun's predictions line up perfectly with an Aug. 3 email from Kathryn Leathers, Governor's Office General Counsel, to staff with the Attorney General's Office.¹ In that email she explained: "Of possible exemptions: medical for sure; and religious (if we have to; if yes, as narrow as possible)." Mr. Chun, likely aware of Ms. Leathers' email, confidently told Coach Rolovich that if he didn't get the vaccine, he could be expected to be fired with cause on Oct 19, 2021.

On August 19, 2021, Coach Rolovich was again summoned to Mr. Chun's office for a meeting at 4:30 p.m. Bryan Blair was also present at the meeting. Mr. Chun told Coach Rolovich that he had 4 choices: 1. Get the vaccine; 2. Don't get the vaccine and get fired. 3. Claim an exemption; or 4. Resign right now. Coach Rolovich told Mr. Chun that he wasn't resigning and that he wanted to coach the team. Mr. Chun said, "but you say you don't care about the money" and "why don't you just resign?" Mr. Chun then accused Coach Rolovich of having situational integrity. Mr. Chun also called the Coach a "Con-man" and accused him of being selfish. Mr. Chun then stated that Coach Rolovich's objections to receiving the vaccine were causing Mr. Chun and President Schulz reputational damage. Mr. Chun then stated that all Coach Rolovich had to do is get vaccinated.

Mr. Chun admitted his efforts to get Coach Rolovich to take the vaccination in the past had been coercive, and Coach Rolovich responded that the present meeting was much more coercive than earlier meetings. Mr. Chun pressed Rolovich again about the vaccine, and Coach Rolovich said that he believed he had privacy rights and didn't feel comfortable telling Mr. Chun about his position on the vaccine. Mr. Chun then demanded that Coach Rolovich tell him what his answer would be.

Mr. Chun then stated that Governor Inslee "did this" just to come after Coach Rolovich and WSU. Based on the context of Mr. Chun's statement, Coach Rolovich understood "did this" to mean that Governor Inslee was trying to force Coach Rolovich's hand with his new mandate because he was angry that the highest paid and one of the highest profile State employees had asserted personal or religious objections to his vaccine mandate. Mr. Chun also admitted to Coach Rolovich that the Board of Regents wanted him fired.

At this point in their heated exchange, Mr. Chun modified his earlier statement: he now said that Coach Rolovich only had two options: get vaccinated or resign.

Up to this point, Coach Rolovich had refrained from bringing his religious beliefs into his conversations with Mr. Chun about COVID vaccines. Coach Rolovich didn't feel comfortable talking about his faith. His faith is a very personal matter to him and he was uncomfortable talking about his religious beliefs with his supervisor. Coach Rolovich was also uncomfortable because he did not know how Washington State University would react to him sharing his religious opposition to medical research based on aborted fetal tissue, given that WSU professors have in the past publicly defended such research. However, after Mr. Chun made it clear that WSU intended to terminate him, Coach Rolovich asked Mr. Chun and Mr. Blair about the

¹ Brandi Kruse, Emails: State sought to make religious vaccine exemption 'as narrow as possible,' FOX 13 Seattle, Aug. 24, 2021, <https://www.q13fox.com/news/emails-state-sought-to-make-religious-vaccine-exemption-as-narrow-as-possible>.

University's process for requesting a religious exemption from a vaccine mandate. Mr. Chun and Mr. Blair said they did not know details about the University's process. They said they had been on the phone with HRS about that very topic earlier in the day. Coach Rolovich had also emailed HRS about the process by this time, but no one had any answers because the Governor hadn't yet made his proclamation.

Mr. Chun then told the Coach that he needed to have his religious exemption approved by the Sunday of game week vs. Utah State. Coach Rolovich asked who approves it. They didn't know. He asked them when it would be available. They didn't know. Coach Rolovich then responded that he feared the University would not be able to approve his exemption by Mr. Chun's deadline, August 29, given that the University's policy had not even been public, let alone made available to him. Mr. Chun and Mr. Blair told Coach Rolovich that they were in a time crunch and had to make a decision if he was going to coach this season. They made it sound like he wouldn't be able to coach until his exemption was approved. They said they did not want to start a season with the Coach if they thought they may have to fire him on Oct 18th, according to the Governor's mandate.

Coach Rolovich responded that he would seek a religious exemption right then if one was available. Chun and Blair then got even more heated and started to question Coach Rolovich's character. Mr. Chun said if Coach Rolovich got the religious exemption, he would forever question his character. Mr. Chun and Mr. Blair both talked about the early days of the pandemic, and that Coach Rolovich hadn't mentioned his faith. Coach Rolovich said that he did not see the point, as he does not see faith and science as exclusive (neither does the law). Coach Rolovich also recalls that Chun and Blair had questioned Coach Rolovich's faith early in the COVID pandemic. Chun and Blair then began to go on about how hard the religious exemption would be and that there is no guarantee that he would get his approved. Coach Rolovich again asked what the criteria was going to be. They said they did not know.

B. WSU Rejected Coach Rolovich's Application for a Religious Exemption from the Governor's Vaccine Mandate.

In the weeks that followed Governor Inslee's decision to create a vaccine mandate for State employees, WSU developed its own procedures as to how employees could request, and how the University would consider, requests for religious exemptions from the COVID-19 vaccine requirement found in Proclamation 21-14.1.

On September 28, 2021, Coach Rolovich completed his application for a religious exemption and submitted it to HRS.

On October 6, 2021, HRS notified Mr. Chun that the University had completed its "good faith review" process and had determined that Coach Rolovich was entitled to a religious exemption from the COVID-19 vaccine requirement because it found that he had articulated a "sincerely held religious belief" that prevented him from complying with the Governor's mandate.

HRS then informed Mr. Chun that it was "considering approving the employee's request subject to the following terms and conditions," summarizing a proposed list of accommodations,

including mask wearing, social distancing, and testing requirements. HRS said the next step would be for the Athletics Department to decide whether it was “able to accommodate this request with the above recommendations.” HRS stated in that email that it would not reach out to Coach Rolovich until the University’s “decision on the Religious Accommodation is finalized.” HRS requested that the Athletics Department respond to its proposed accommodations by October 8.

The Athletics Department responded to HRS on October 13 with two memoranda. The first memorandum told HRS that it had rejected HRS’ proposed accommodations and had determined that “the department is not able to accommodate this request.”

The Athletics Department’s second memorandum challenged HRS’ conclusion that “Rolovich met the requirements for a religious exemption to the vaccination requirement by demonstrating a sincerely held religious belief against being vaccinated for COVID-19.” That challenge was based on the Athletics Department’s assertion that “Rolovich had made several statements that cast doubt on his claimed sincerely held religious belief.” In short, the memorandum states that the fact that Rolovich had articulated other reasons for refusing a COVID vaccination before he had told Mr. Chun about his religious objections to the available COVID vaccines “support[ed] re-evaluation of the claimed sincerely-held religious belief.”

On October 14, 2021, EH&S issued a memorandum to Mr. Chun detailing how it had used its “expertise in environmental and occupational health and safety” to make an “individualized assessment” of Coach Rolovich’s working environment and formulate a list of “reasonable and necessary interventions and countermeasures to ensure the safety of the employee and others the employee may be in contact with.”

The Athletics Department subsequently wrote HRS a memorandum, copying EH&S, that rejected EH&S’ recommendations. The Athletics Department rejected EH&S’ assessment that its recommendations would “ensure the safety of the employee and others the employee may be in contact with.”

The Athletics Department also rejected EH&S proposed accommodations on the basis that having an unvaccinated head coach “would create an undue hardship for WSU Athletics given his assigned duties and responsibilities.” For example, the memorandum states:

- J “WSU has already lost significant donor commitments who have withdrawn or withheld donations based on the vaccination decisions of the football staff.”
- J “[B]ecause employees are not vaccinated, attendance at conference media day was done remotely, (which became a major story and embarrassment to WSU), the weekly Coach’s show is now done remotely and has significant decline in attendance, and many media stories concerning the Football Program revolve around the unvaccinated status of the head coach (and assistant coaches).”
- J “The damage to the mission and reputation of the University posed by this situation cannot be understated, nor can it be resolved by accommodation.”

On the afternoon of October 18, Mr. Chun called Coach Rolovich in for a meeting at 4:30. One minute before that meeting, at 4:29, Coach Rolovich received an email from HRS Exemptions, copying Mr. Chun, Mr. Blair, and Ms. Anne McCoy, notifying him that the University was “unable to approve your request for an exemption and accommodation based on a sincerely held religious belief, practice, or observance.” HRS’ email adopted the Athletics Department’s position regarding Rolovich’s sincerity, stating, “Based on your comments, in conjunction with the timing of your request for a religious accommodation, the University questions the assertion that your sincerely held religious views conflict with the University’s vaccine requirement.” HRS’ email also adopted the Athletics Department’s position that Rolovich could not “safely and effectively do your job without undue hardship to the University.”

During that meeting, Mr. Chun handed Coach Rolovich a letter written under his own name with the subject line, “Written Notice of Intent to Terminate for Just Cause.”

II. THE UNIVERSITY’S “BLIND REVIEW PROCESS” FOUND COACH ROLOVICH SINCERE; ALLOWING MR. CHUN TO INTERFERE AND LETTING HIS BIAS OVERRULE THIS DETERMINATION VIOLATED UNIVERSITY POLICY AND COACH’S LEGAL RIGHTS.

WSU’s handling of Coach Rolovich’s religious exemption request is rife with procedural problems and constitutional errors, each of which provides Coach Rolovich with independent legal grounds to challenge WSU’s decision to terminate his contract and its assertion that it had grounds to do so “for just cause.”

The University’s short appeal deadline has prevented us from fully exploring the facts and Coach Rolovich’s causes of action against the University. The following list is, however, a good start.

A. The University Violated its COVID Vaccine Religious Exemption Policy by Sharing Details with Mr. Chun and Allowing Him to Participate in its Sincerity Determination.

According to University counsel Danielle Hess, the University’s published policies setting forth its policy for evaluating requests for religious exemptions from the vaccine mandate are posted online at <https://hrs.wsu.edu/covid-19/vax-verification/>. Part of this policy is expressed in the form of FAQs. In that context, the University states that HRS will not share the details of an employee’s request for an exemption with the employee’s supervisor or manager:

I am requesting a medical or religious exemption, what will my supervisor/manager see as my exemption reason?

The Workday process will show as “in-process” when an exemption is requested and will be updated to “complete” once reviewed and accepted. HRS will work directly with employees regarding their requested exemption as needed.

The University described its process in more detail in an October 8, 2021, statement posted on its website:²

The requests for religious exemptions are evaluated in a ***“blind” review process***, meaning the identities of the individuals requesting exemptions are unknown to the members of the review committee except in instances when additional information is needed through follow-up contact. Separate review committees were created for students and employees. . . .

For employees, the exemption requests go through a two-step process. The first is the ***blind review***. Then, if an exemption is approved, the request moves to a separate accommodation review step where a determination is made whether the unvaccinated employee will be able to perform their duties without risking the health and safety of the community. (emphases added)

The media took great interest in the University’s statement and published articles detailing the University’s process in more detail. For example, one such article said:

WSU has implemented a ***blind review process***, so identifying marks for all employees will be removed when the panel evaluates the requests. . . .

Approval of Rolovich’s request during the ***blind review process*** does not guarantee his continued employment.

An approved request would be sent to the human-resources department, which would identify the employee in question and send an email to his/her supervisor ***indicating the exemption had been approved***.

At that point, the supervisor would determine if reasonable accommodations could be made for the unvaccinated employee to perform his/her job effectively and keep the public safe.³ (emphases added)

Another article drew from the author’s interview with Washington State vice president for communications Phil Weiler:

If the ***blind review*** results in the approval of Rolovich’s exemption request, the process would enter a second phase.

Washington State vice president for communications Phil Weiler could not discuss Rolovich’s case specifically—the university is prohibited by law from commenting—but Weiler outlined the exemption process in general terms.

² Nearly 90% of WSU Employees are Vaccinated, WSU, Oct. 8, 2021, <https://everett.wsu.edu/nearly-90-of-wsu-employees-are-vaccinated/>.

³ Jon Wilner, Here’s the vaccine exemption questionnaire that may determine WSU coach Nick Rolovich’s job status, Seattle Times, Oct. 12, 2021, <https://www.seattletimes.com/sports/wsu-cougar-football/heres-the-vaccine-exemption-questionnaire-that-may-determine-wsu-coach-nick-rolovichs-job-status/>.

An approved request would be sent to the human resources department, which would identify the employee in question ***and send an email to his/her supervisor indicating the exemption had been approved.***

At that point, according to Weiler, the supervisor would determine if the unvaccinated employee would be capable of “keeping the public safe” and performing his/her job effectively.⁴ (emphases added)

The University’s policy and its public representations unmistakably and repeatedly stated that an employee’s identity would be kept private and the employee’s supervisor would not be notified, let alone involved, until after the University’s “blind review process” was complete and the University had determined whether “the exemption had been approved.”

The promise of a blind and confidential process was an important representation, and not at all a surprising one. HR departments typically make such review processes confidential because these sorts of exemption requests contain highly sensitive personal information. HR frequently has to collect personal information that must be handled confidentially for privacy reasons. Requests for medical exemptions and accommodations require the employee to disclose protected health information. Disclosing this information to a supervisor could also reveal that the employee has a disability, such as HIV status, that could lead to the employee suffering disability discrimination. Employees requesting religious exemptions likewise have important privacy interests that are violated when employers share details with an employee’s supervisor or manager.

We do not know whether the University has kept its promises and followed its policy in other instances. But we know for certain that here it did not.

The University concluded that Coach Rolovich was entitled to the exemption because his religious beliefs are sincere. But then, a week later, the University abandoned its process requiring “blind” determination and instead allowed Mr. Chun to intervene, improperly permitting him to provide input that questioned Coach Rolovich’s sincerity, thereby poisoning its original determination that the exemption had been approved.

The University’s procedural detours are as disturbing as they are unlawful. Mr. Chun should never have been told what sort of exemption Coach Rolovich had sought, nor should Mr. Chun have been allowed to interfere with the exemption decision that had already been made. HRS was clearly satisfied that it did not need additional information to assess the sincerity of Coach Rolovich’s religious beliefs because HRS’ October 6 email to Chun states that “WSU has engaged in a good faith review of the information submitted through written and/or oral communications, which support the accommodation request based on a sincerely held religious belief.”

⁴ Jon Wilner, Would WSU actually fire Nick Rolovich? Examining the exemption review process with the vaccine mandate deadline approaching, Mercury News, Oct. 7, 2021, <https://www.mercurynews.com/2021/10/07/would-wsu-actually-fire-nick-rolovich-examining-the-exemption-review-process-as-vaccine-mandate-deadline-approaches/>.

Nevertheless, Mr. Chun somehow managed to get HRS to reconsider the exemption it had granted Coach Rolovich, manipulating the process by unlawfully supplying HRS with self-serving statements aimed at undermining Coach Rolovich's exemption. There is no provision, however, in the exemption process that allowed Mr. Chun to reopen and reverse the exemption determination by HRS ("The requests for religious exemptions are evaluated in a *"blind" review process*, meaning the identities of the individuals requesting exemptions are unknown to the members of the review committee except in instances when additional information is needed through follow-up contact [with the person claiming the exemption]".)

As shown below, these procedural violations also support other causes of action against the University. But here, it is enough to note that the University violated its own established procedures in its thinly-veiled effort to reverse HRS' decision to grant Coach Rolovich's request for a religious exemption.

B. The University's Decision to let Mr. Chun Intervene and Direct its Exemption Process Violated Coach Rolovich's Right to Procedural Due Process.

The Fourteenth Amendment to the U.S. Constitution prohibits government from depriving people of liberty or property without procedural due process. One aspect of this constitutional right is that government cannot terminate employees who have a "for cause" provision in their employment contracts except through the reasoned application of a rule of law, something that requires that the decision be made by a neutral decisionmaker. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion).

As noted above, if the University had followed its own procedures, Coach Rolovich's right to procedural due process and a neutral decisionmaker would have been satisfied. But then again, if the University had followed its procedures, HRS' decision to grant Coach Rolovich's religious exemption would not have not have been subject to Mr. Chun's bad faith and illegal efforts to reverse the decision.

The University did not leave the question of whether Coach Rolovich would receive an exemption in the hands of its "blind review process," but instead handed the reins over to Mr. Chun. And Mr. Chun was anything but a neutral decision maker.

As detailed in Section I.B., before Mr. Chun interfered with the University's "blind review process," he had on multiple occasions expressed anger and outrage at Coach Rolovich for declining to take a COVID vaccine. Mr. Chun's comments to Coach Rolovich indicated that he cared more about Governor Inslee's ire, President Schulz's wishes, and his own reputation than about Coach Rolovich's religious faith and his legal rights.

When Coach Rolovich first told Mr. Chun that he intended to make use of the State's religious exemption, Mr. Chun called him a con-man and questioned his character. Mr. Chun told Coach Rolovich that the Governor was targeting him and that the regents wanted him fired. It was clear to Coach Rolovich that Mr. Chun was feeling substantial pressure from his higher ups over Coach Rolovich's vaccination status. Newspaper articles confirm that Governor Inslee and

President Schultz were angry at Coach Rolovich and hint at the pressure Mr. Chun was under to ensure that Coach Rolovich would not be allowed to continue as WSU's head football coach unless he submitted to the Governor's vaccine mandate.⁵

Even back in August, Mr. Chun made it clear that he would do everything in his power to make sure that Coach Rolovich was denied an exemption from the vaccine mandate, telling Coach Rolovich that he really had only two options: get vaccinated or resign.

We now know that Mr. Chun made good on his threat. He intervened and forced the University to reopen its sincerity determination to make sure that the process reached his predetermined, preannounced conclusion. Given Mr. Chun's hostility toward Coach Rolovich and his convictions, and the substantial pressure Mr. Chun was under from University leadership and Olympia, it is hard to imagine a less neutral decisionmaker.

As shown in Section III below, Mr. Chun's assertion that the University could not safely accommodate Coach Rolovich's religious exercise is unreasonable. Mr. Chun had no basis on which to disregard EH&S' "expertise" in this area. Given there is no science to support Mr. Chun's alleged "safety" concern, the best way to understand Mr. Chun's conclusion is that it proceeded from his own personal bias and the pressure he was under from the Governor, President Schulz, and the University's rectors to fire the Coaches.

Mr. Chun's bias also infected the *manner* in which he and the University have tried to frame their decision to terminate Coach Rolovich. Universities fire football coaches pretty frequently. No one knows that better than football coaches and their families. That is why Coach Rolovich's contract with the University has a "without cause" provision, so that Coach Rolovich could continue providing for his family and would have time to land on his feet if his relationship with the University went sour. But here, the University has tried to describe this as a "just cause" terminations, even though the present circumstances are the result of Coach Rolovich's sincere religious beliefs, an unexpected COVID pandemic, and the University's own restrictive policies. No neutral decisionmaker would see these as "just cause" determinations.

Mr. Chun and the University have undoubtedly strained to frame Coach Rolovich's termination as a "just cause" dismissal in hopes that the University could avoid having to buy out Coach Rolovich's contract, which it must if it terminates him "without cause." They know that without-cause terminations would cost the University, for Rolovich and his assistant coaches, about five million dollars in aggregate. The Fourteenth Amendment precludes the University from allowing a deeply prejudiced decisionmaker to deprive them of their property interests in their contracts in this manner.

By allowing someone with a clear personal bias, and under such intense pressure to deliver a preordained outcome, to have veto power over his request for a religious exemption, the University violated Coach Rolovich's Fourteenth Amendment right to procedural due process.

This appeal process, now explicitly controlled by Mr. Chun, only compounds the procedural due process violation. Given Mr. Chun's history with Coach Rolovich, his biased intervention in the

⁵ Several examples may be found in articles cited in Section III.E. below.

University's sincerity determination, and his biased refusal to accommodate Coach Rolovich's religious exercise, it is impossible to imagine that Mr. Chun could preside as a neutral decisionmaker over Coach Rolovich's appeal.

C. The Governor's and the University's Demonstrated Hostility Toward Religious Exemptions, Including Coach Rolovich's Exemption, Violates His First Amendment Free Exercise Rights.

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). In *Masterpiece Cakeshop*, the Supreme Court found that the Colorado Civil Rights Commission's "inappropriate and dismissive comments" about Jack Phillips' religious beliefs and their doubts about his sincerity showed a "lack of due consideration for Phillips' free exercise rights and the dilemma he faced." *Id.* at 1729. The Court found that these "official expressions of hostility to religion . . . were inconsistent with what the Free Exercise Clause requires." *Id.* at 1732.

Here, Governor Inslee and Mr. Chun have both demonstrated hostility toward religious objections to the vaccine mandate. Even before Governor Inslee issued his sweeping vaccine mandate, his hostility toward those who would seek religious exemptions was on full display. As noted above, the Governor's General Counsel sent an email on August 3 stating that the Governor's mandate would include "medical" exemptions "for sure," but would only offer "religious" exemptions "if we have to," and then "as narrow as possible."

Mr. Chun eagerly followed the Governor's effort to "narrow" the conditions under which a religious exemption could be obtained. Even before the vaccine mandate had been issued, Mr. Chun told Coach Rolovich that his exemption would be scrutinized to no end, and that Inslee's mandate would have a "high threshold" for religious exemptions moving forward.

These facts raise much more than a "slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices." Under *Masterpiece Cakeshop*, Governor Inslee's and Mr. Chun's hostility toward religious objections to the vaccine mandate violated Coach Rolovich's First Amendment rights.

D. Washington's and the University's Preference for Medical over Religious Exemptions Also Violates Coach Rolovich's Free Exercise Rights.

The Free Exercise Clause does not only prohibit government hostility toward Coach Rolovich's religious beliefs: it also prohibits Washington's and WSU's preferential treatment of medical exemptions over religious exemptions. The Supreme Court has been unmistakably clear in the context of the COVID pandemic: government actions "are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any

comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Government demonstrates this unconstitutional favoritism when it is more generous with medical exemptions than with religious exemptions. *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (government interest in prison safety cannot excuse policy that allowed beards for medical but not religious reasons).

The August 3 email from Governor Inslee’s General Counsel bluntly stated the State’s favoritism for medical exemptions over religious exemptions:

Of possible exemptions: medical for sure; and religious (if we have to; if yes, as narrow as possible).⁶

Around two weeks later, Mr. Chun—no doubt aware of the State’s bias and likely familiar with Ms. Leathers’ email, and knowing that Coach Rolovich was seeking a religious and not a medical exemption from the mandate—confidently told Coach Rolovich that if he didn’t get the vaccine, he could be expected to be fired with cause on October 19, 2021.

The University’s statistics on vaccination exemptions reflects the Governor’s attorney’s policy and Mr. Chun’s bias: WSU has approved requests for medical exemptions at almost twice the rate of religious exemption requests.⁷

The State’s and the University’s manifest preference for medical over religious exemptions means that Washington’s mandate is not neutral or generally applicable and that the University’s actions towards Coach Rolovich will fail strict scrutiny.

E. The University’s Failure to Ever Ask Coach Rolovich any Follow-Up Questions Demonstrates that HRS Did Not Have Honest Doubts About His Sincerity.

The Governor’s mandate and the University’s religious exemption process require the University to determine whether Coach Rolovich’s requested exemption was based on a “sincerely held religious belief.” As explained above, University policy precluded the review committee or HRS from letting Mr. Chun know that Coach Rolovich was seeking a religious exemption, let alone allowing him to infect its “blind review process” and overrule its determination.

Courts have “few occasions to [address sincerity], as the sincerity of a religious belief is not often challenged.” *McAlister v. Livingston*, 348 F. App’x 923, 935 (5th Cir. 2009). “Like the religious nature of a belief, observance, or practice, the sincerity of an employee’s stated religious belief is usually not in dispute and is ‘generally presumed or easily established.’” *Moussazadeh v. Tx. Dep’t of Crim. Just.*, 703 F.3d 781, 790 (5th Cir. 2012).

⁶ Brandi Kruse, Emails: State sought to make religious vaccine exemption ‘as narrow as possible,’ FOX 13 Seattle, Aug. 24, 2021, <https://www.q13fox.com/news/emails-state-sought-to-make-religious-vaccine-exemption-as-narrow-as-possible>.

⁷ Preliminary Vaccination & Exemption Data, WSU Insider (last updated Oct. 6, 2021), <https://news.wsu.edu/wsu-vaccination-and-exemption-data/>.

The sincerity inquiry is even more dangerous when the employer in question is a governmental entity. That is because the Establishment Clause precludes government from deciding what counts as a legitimate theological belief. *See, e.g., Roby v. U.S. Dept. of Navy*, 76 F.3d 1052, 1056 (9th Cir. 1996) (“when the military undertakes to measure the depth with which the applicant holds [his] belief, we think the inquiry becomes an impermissible subjective look into his heart and soul. The question is, does he believe, not, how deeply does he believe.”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (“it is not for us to say that their religious beliefs are mistaken or insubstantial . . . our narrow function . . . in this context is to determine whether the line drawn reflects an honest conviction.”).

Even if the government believes that an employee has been inconsistent in following his convictions, this is not itself grounds for ruling him insincere. “[A] sincere religious believer doesn’t forfeit his religious rights merely because he is not scrupulous in his observance” *Grayson v. Schuler*, 666 F.3d 450, 454-55 (7th Cir. 2012); *see also Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013) (“Has the plaintiff had a true conversion experience? Is he following religious practices that are embedded in his culture and family upbringing? Is he making Pascal’s coldly rational wager to believe in God based on his self-interest? These questions are simply not an appropriate or necessary line of inquiry for courts. We are not and should not be in the business of deciding whether a person holds religious beliefs for the ‘proper’ reasons. We thus restrict our inquiry to whether or not the religious belief system is sincerely held; we do not review the motives or reasons for holding the belief in the first place.”); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997) (en banc) (finding that a Jewish employee proved her request for leave to observe Yom Kippur was based on a sincerely held religious belief, even though she had never in her prior eight-year tenure sought leave from work for a religious observance, and conceded that she generally was not a very religious person, but evidence showed that the recent birth of her son and the death of her father strengthened her religious beliefs).

These important constitutional principles are reflected in the Equal Employment Opportunity Commission’s (“EEOC”) guidance for employers facing requests for religious accommodation. The EEOC cautions employers they should generally assume that an employee’s request for a religious accommodation is based on a sincerely held religious belief. Its guidance states that an “employer would be justified in seeking additional supporting information” about the employer’s asserted religious belief *only* if the employer has determined that it has “an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice.”⁸ EEOC Compliance Manual on Religious Discrimination, Jan. 15, 2021, available at <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (emphasis supplied); *see also, Chenzira v. Cincinnati Child.’s Hosp. Med. Ctr.*, No. 1:11–CV–00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (holding that Title VII could cover a request to be excused from hospital mandatory vaccination policy due to vegan opposition to a vaccine that was animal-tested or contains animal byproducts if plaintiff “subscribe[d] to veganism with a

⁸ The EEOC recently confirmed that its general guidance applies in full to requests for exemptions from COVID-19 vaccine mandates. *See* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, at L.2 (last updated Oct. 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>.

sincerity equating that of traditional religious views,” noting her citation to essays about veganism and to Biblical excerpts).

Washington State and the University knew all this. Press Secretary Mike Faulk with Governor Inslee’s office explained to reporters that if a State employer had reason to believe an applicant had in the past been inconsistent regarding his stated religious objection, “the HR professionals would engage in follow up questions to better understand the person’s history, such as demonstrating changes they have made as an adult based on those beliefs. We understand people’s religious views may change over time.”⁹

The University’s failure to follow-up with Coach Rolovich means that it never really doubted Coach’s sincerity. Mr. Chun’s expressed doubts about Coach Rolovich’s sincerity were unjustified and improper. His uninvited and unlawful “follow up” with HRS violated (obliterated) the University’s own policy, the Governor’s office’s representations, EEOC guidance, and Coach Rolovich’s rights.

F. Mr. Chun Created Unconstitutional Conditions Burdening Coach Rolovich’s First Amendment Rights.

Statements made by Mr. Chun to Coach Rolovich regarding his decision not to be vaccinated created unconstitutional conditions burdening his First Amendment rights. On multiple occasions Mr. Chun questioned Coach Rolovich’s character, the sincerity of his faith, and his mental health, among other threatening remarks, Mr. Chun told him that he is selfish, his views are extreme, that he could expect to be fired on October 19, 2021, that if he didn’t tell Mr. Chun he would get vaccinated, he would be put on administrative leave until the October 19 deadline, and Mr. Chun offered his wife as someone the Coach could talk to because she had been in a couple different religions he referred to as “cults”. In short, Mr. Chun created a hostile work environment and unconstitutional conditions burdening Coach Rolovich’s First Amendment rights. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (“[U]nconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them”); *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (“[An] overarching principle, known as the unconstitutional conditions doctrine ... vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up”). Moreover, there is a constitutionally protected liberty interest in refusing unwanted medical treatment. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990); *see also, Washington v. Harper*, 494 U.S. 210, 229 (1990) (A “forcible injection ... into a nonconsenting person’s body represents a substantial interference with that person’s liberty[.]”).

⁹ Brandi Kruse, Emails: State sought to make religious vaccine exemption ‘as narrow as possible,’ FOX 13 Seattle, Aug. 24, 2021, <https://www.q13fox.com/news/emails-state-sought-to-make-religious-vaccine-exemption-as-narrow-as-possible>.

Mr. Chun's relentless and coercive efforts to force Coach Rolovich to get vaccinated were an unmistakable trespass upon the Coach's First Amendment rights.

G. WSU Breached its Contract with Coach Rolovich Because it Did Not Have "Just Cause" to Terminate Him.

As discussed above, because Coach Rolovich's religious exemption was granted by HRS, WSU did not have grounds to terminate him with just cause. Furthermore, a denial of an accommodation by Mr. Chun does not constitute "just cause" under the terms of his contract. There is no *force majeure* clause in Coach Rolovich's contract with WSU, nor is there any provision that contemplates a scenario where he could be terminated because he refused to violate his conscience, bodily integrity, or religious faith by refusing to take a vaccine. Coach Rolovich's response to a global pandemic, and the actions and mandates of government officials in response to the pandemic, could not have been contemplated by either party when the contract was executed. Requiring an employee to respond to a pandemic by taking new vaccines developed through the use of abortion-derived cell lines was never part of Coach Rolovich's employment contract with the University.

Mr. Chun's assertions in his October 18 Notice of Intent to Terminate letter, that Coach Rolovich's decision to decline to receive a COVID vaccine on religious grounds gives it "just cause" to terminate him, is without basis in fact or law:

- J **Paragraph 1.2.1:** Coach Rolovich complied with the vaccine requirement: he sought a religious exemption and it was granted. WSU's refusal to provide an accommodation does not change the fact that Coach Rolovich complied as required.
- J **"Inability to attend Pac 12 media day in LA"** *See above.* Also, this was a decision made by the Pac 12 and not Coach Rolovich's choice. It appears that media members were allowed at media day with proof of a negative test before arriving. Coach Rolovich would have taken a test to attend. Other conferences allowed their unvaccinated coaches to attend their media day with a negative test.
- J **"Inability to attend Friday donor lunches"** *See above.* Coach Rolovich was never asked to go to those lunches. It was only vaccinated coaches that were asked. Coach Rolovich would have attended and worn a mask. Nothing in the mandate required Chun or anyone else not to invite Coach Rolovich to the luncheons.
- J **"Inability to attend the WSU Football Coaches Show at Zeppoz..."** – *See above.* Also, Coach Rolovich did attend the show in person during the 2020 season at the same establishment.¹⁰
- J **"Inability to attend live donor meetings, including some events in July..."** – *See above.* Also, the reason the July donor meetings were cancelled was due to Athletics

¹⁰ *See also* Section III.D.7, showing that the University has permitted coaches and players to appear on the WSU Football Coaches Show at Zeppoz in violation of applicable mask mandates.

Department quarantine rules that were very unclear. The Athletics Department said unvaccinated people would have to quarantine for 10 days if they left "the area" during the summer. The term "area" was unclear and if Coach Rolovich left the "area" to attend these donor events, he would have missed the beginning of training camp. Coach Rolovich viewed training camp as the most important part of his job.

J) **“You are unable to attend individual position meetings or engage in one-on-one meetings...”** - *See above*. Also, Coach Rolovich attended any meeting he wanted with a mask and distancing. He engaged with players all the time at practice, being careful as possible to socially distance. He also talked to assistant coaches at practice. He attended team meetings. The claim that interactions with assistant coaches and players has been limited and has led to "poor planning, lack of communication and a void in leadership" rings hollow in view of the three game Pac 12 winning streak the Cougars had before Coach Rolovich was informed he was being terminated.

J) **“Your ability to travel extensively and recruit has been impacted...”** *See above*. Also, recruiting has not been significantly impacted. WSU has had great in-state commitments. Significantly, there is an inflated roster due to the covid extra year, so Coach Rolovich's plan was to be a little slower with commits so they didn't over sign and not have room, which would have led to NCAA violations. Coach Rolovich also recruited when the team had road games in Utah and Cal Berkely. This can be confirmed through compliance. Mr. Chun should also look at the “visit to commit” ratio.

Mr. Chun also suggests in his Written Notice of Intent to Terminate that Coach Rolovich “voic[ed] physical threats regarding a coach we talked about” That is a baseless and reckless allegation. Coach Rolovich promptly responded in an email to Mr. Chun after he first made the allegation:

In your email today [Oct. 18], you made a couple of assertions that simply aren't accurate. First, you stated that I had voiced physical threats against a certain coach, and that based on that interpretation of my words, I could be disciplined or terminated.

My words were clearly not meant as a threat, but they were intended to express to Bryan my frustration with, and dislike of June Jones. I found it entirely inappropriate and in bad faith that you and June were having discussions about him replacing me.

It was even more egregious that June had subsequently disclosed my religious exemption request to a USA Today reporter, who wrote an article about it.

Therefore, when Bryan talked about bringing June Jones to a practice, I was merely letting Bryan know just what a bad idea, and how improper that would be.

My words were never meant as a threat (I would never physically harm him), and you and Bryan absolutely know that. Frustration is not an act of insubordination and I have done nothing wrong.

Second, I never “blocked” Dan Morrison from coming to Pullman. I actually recommended him, so why would I block him? I did speak with Dan on the phone and he asked me my honest opinion about certain things. Therefore, I was candid with him as I should have.

As discussed herein, it is clear that Mr. Chun decided to terminate Coach Rolovich as far back as August, even before Inslee’s vaccine mandate was issued. The hostility displayed by Mr. Chun toward Coach Rolovich because of his decision not to get vaccinated, frankly, is very disturbing.

WSU has acted in bad faith in breaching its contract with Coach Rolovich.

III. THE UNIVERSITY’S REFUSAL TO ACCOMMODATE COACH ROLOVICH’S RELIGIOUS EXERCISE VIOLATED ITS OWN POLICIES AND ROLOVICH’S LEGAL RIGHTS

Although HRS proposed what it thought was an acceptable reasonable accommodation, and although EH&S applied its “expertise” to perform a detailed, individualized assessment of Coach Rolovich’s workplace and conclude that the University could safely accommodate Coach Rolovich’s religious exercise without sacrificing his own safety or that of others, Mr. Chun intervened again. He rejected the proposed accommodations and the University adopted Mr. Chun’s conclusion in its October 18 email to Coach Rolovich.

By finding accommodations unworkable without ever consulting with Coach Rolovich, the University again violated its own policy and Coach Rolovich’s legal rights. Mr. Chun’s claim that the University could not “safely” accommodate Coach Rolovich is irrational. It contradicts EH&S’ expert opinion and is also unsupportable in light of the testimony from Coach Rolovich’s expert witness, Dr. Jayanta Bhattacharya, Professor of Medicine, Economics, and Health Research and Policy at Stanford University. The past year shows that Coach Rolovich could indeed work safely and effectively under the University’s safety protocols.

In the light of all this evidence and experience, the only thing that remains of the University’s “undue burden” argument are speculative claims that accommodating religious exercise here will hurt the University’s reputation and its bottom-line. But our civil rights laws would mean nothing if employers, landlords, and places of accommodation could escape the duty to accommodate on these bases.

A. The University’s Conclusion that it Could Not Accommodate Coach Rolovich’s Religious Beliefs is Legally Irrelevant to the Question of Whether the University Can Fire Him for “Just Cause.”

The first thing to note about the University’s accommodation inquiry is that it is legally irrelevant to one of the most important questions at issue here: whether the University can legally terminate Coach Rolovich for “just cause.”

The University’s October 18 email to Coach Rolovich tries to hedge its bets by claiming two alternative grounds for denying his exemption. First, the University claims it found Coach Rolovich ineligible for an exemption because it “questions” his sincerity. As we have shown, the

University's blind review process ran its course and concluded that Coach Rolovich was sincere. That was the end of the story. The fact that HRS and EH&S developed and EH&S approved accommodations for Coach Rolovich demonstrates that the University had reached a final conclusion on the sincerity question.

To be sure, the University has tried to claim that it actually found Coach Rolovich insincere—or, more accurately, that it “questions” his sincerity. To the extent the University claims that the University's October 18 email represents its conclusion on this matter, Section II demonstrates that this result was reached in violation of its policies, civil rights laws, and the United States Constitution. The University will lose badly if it tries to defend Coach Rolovich's termination on this basis.

Second, the University claims it denied Coach Rolovich's request for religious accommodation because the accommodations recommended by HRS and EH&S would place an “undue burden” on the University. As shown below, this result too was reached in violation of University policy and Coach Rolovich's rights.

But before getting to those deficiencies, it is important to note that the University's accommodation defense cannot save its claim that the University has grounds to terminate Coach Rolovich for “just cause.” The accommodation argument presumes HRS' conclusion: Rolovich had presented a “sincerely held religious belief.” And Washington caselaw is clear that an employer cannot have just cause to terminate an employee “where the termination resulted because the employee exercised a legal right or privilege,” such as the fundamental right to religious exercise. *Farnam v. CRISTA Ministries*, 807 P.2d 830, 834 (Wash. 1991).¹¹

B. The University Violated Its Own Policy and Coach Rolovich's Rights by Denying Him an Accommodation Without Seeking His Input.

The University violated the law when, without seeking Coach Rolovich's input, it concluded that it could not reasonably accommodate him.

An employer's duty to negotiate possible accommodations ordinarily requires it to take “some initial step to reasonably accommodate the religious belief of that employee.” *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004). It is clear “that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business.” *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440–41 (9th Cir. 1993) (internal citations omitted).

An employee's “concomitant duty” to cooperate, however, arises only *after* the employer has suggested a possible accommodation: “[T]he statutory burden to accommodate rests with the employer[;] the employee has a correlative duty to make a good faith attempt to satisfy his

¹¹ Article I, Section 11 of the Washington Constitution “absolutely protects the free exercise of religion, and extends broader protection than the first amendment to the federal constitution.” *City of Woodinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009).

needs *through means offered by the employer.*” *Id.* (internal citation omitted) (emphasis supplied).

Moreover, an employee’s “correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer” arises after the employer takes the “initial step” towards accommodating [the employee’s] conflicting religious practice” by suggesting a possible accommodation. *E.E.O.C. v. AutoNation USA Corp.*, 52 F. App’x 327, 329 (9th Cir. 2002).

In this case, the University’s HRS showed that it understood this requirement. Its religious exemption form notifies employees:

Washington State University may need . . . [to] discuss reasonable accommodations to WSU’s COVID-19 vaccination requirement. ***Human Resource Services will reach out to you*** if additional information is needed to process this request. (emphasis added)

But that did not happen. Neither before nor after Mr. Chun unlawfully intervened to override HRS and EH&S did the University reach out to Coach Rolovich to express its concerns, give him an opportunity, and to engage in the “bilateral cooperation” that the Ninth Circuit and EEOC expect.

C. The University Had No Reasonable Basis for Preferring Mr. Chun’s Assertions Over EH&S’ “Expertise” on the Safety Issue.

A “conclusion” that is formed without proof or sufficient evidence is a conjecture. And that is the best way to describe the University’s decision to adopt Mr. Chun’s claim that it could not “safely” accommodate Coach Rolovich’s religious beliefs. First, it was irrational for the University to give its Director of Athletics more weight than its Environmental Health and Safety Department on this key question. Second, as shown in the section to follow, the University’s alleged safety concerns are at odds with the best science on COVID-19 and the available vaccines.

On October 14, the Director of Environmental Health and Safety Department issued an eight-page memorandum that applied its “expertise in environmental and occupational health and safety” to the question of whether the University could both accommodate Coach Rolovich’s religious beliefs and “ensure the safety of the employee and others the employees may be in contact with.” After performing a detailed “individualized assessment” of Coach Rolovich’s workplace and responsibilities, EH&S answered that question in the affirmative.

Sometime in the next few days, Mr. Chun wrote his own memorandum that refuted EH&S’ expert opinion. Why? Mr. Chun said that “[f]requent close physical proximity to and contact with others is an inherent part of coaching.” But EH&S knew that “[s]ocial distancing is generally not possible” for Coach Rolovich because his job “require[es] direct face-to-face services or activities for greater than 15 minutes.”

Mr. Chun also said Coach Rolovich had to do a lot of travel. But EH&S knew that too: it acknowledged that Coach’s “duties include events where vulnerable populations may be present,

with people ranging in age from k-12 to retirement;” it recognized that his “responsibilities require regular travel.”

EH&S has “expertise in environmental and occupational health and safety.” Pat Chun has a bachelor’s degree in journalism and a master’s degree in sports leadership.

In litigation over Coach Rolovich’s termination, EH&S’ memorandum qualifies as a declaration against interest. That Mr. Chun refuted EH&S expert opinion is further evidence that he cared more about firing Coach Rolovich than about public health. That the University gave Mr. Chun’s conjecture more weight than EH&S reasoned judgement is further evidence that the University cared more about carrying out Mr. Chun’s, President Schulz’s, and its regents’ wishes than following the law and respecting Coach Rolovich’s rights.

D. The University’s Conclusion That It Could Not Safely Accommodate Coach Rolovich’s Religious Beliefs was Based on Assumptions Not Supported by Science and Contradicted by Prior Experience.

To further demonstrate the unreasonableness of the University’s conclusions, Coach Rolovich submits a declaration from Dr. Bhattacharya, a former Professor of Medicine (20+ years) and current Professor of Health Policy at Stanford University School of Medicine. *See* Exhibit A, attached hereto; Dr. Bhattacharya’s CV is attached hereto as Exhibit B. Dr. Bhattacharya’s declaration provides evidence in support of his conclusion that WSU can keep its employees safe while granting exemptions for those whose medical conditions and religious convictions prevent them from receiving a COVID vaccine.

Dr. Bhattacharya is also a research associate at the National Bureau of Economic Research, and Director of Stanford’s Center for Demography and Economics of Health and Aging. Dr. Bhattacharya holds an M.D. and Ph.D. from Stanford University. He has published 154 scholarly articles in peer-reviewed journals in the fields of medicine, economics, health policy, epidemiology, statistics, law, and public health, among others. Dr. Bhattacharya’s research has been cited in the peer-reviewed scientific literature more than 11,600 times. *See*, Declaration of Dr. Jayanta Bhattacharya, p. 1-2, ¶ 3.

Dr. Bhattacharya has dedicated his professional career to the analysis of health policy, including infectious disease epidemiology and policy, and the safety and efficacy of medical interventions. He has both studied extensively and commented publicly on the necessity and safety of vaccine requirements for those who have contracted and recovered from COVID-19 (individuals who have “natural immunity”). Dr. Bhattacharya is intimately familiar with the emergent scientific and medical literature on this topic and pertinent government policy responses to the issue both in the United States and abroad. *Id.* at p. 3, ¶ 4.

Dr. Bhattacharya is also the primary co-author of the Great Barrington Declaration, which describes an alternate policy of focused protection. His co-authors of the Declaration include Prof. Martin Kulldorff of Harvard University and Prof. Sunetra Gupta of Oxford University. Over 12,000 epidemiologists and public health professionals and 35,000 medical professionals have co-signed the Declaration. *Id.*, p. 8, ¶ 19.

In stark contrast to the scientific evidence relied upon by Dr. Bhattacharya in his declaration, WSU has produced no evidence, let alone scientific evidence, that the accommodation plans developed by EH&S would not be effective for Coach Rolovich.

1. The median infection survival rate for COVID-19 is 99.7 %.

“According to a meta-analysis by Dr. John Ioannidis of every seroprevalence study conducted to date of publication with a supporting scientific paper (74 estimates from 61 studies and 51 different localities worldwide), the median infection survival rate—the inverse of the infection fatality rate—from COVID-19 infection is 99.77%. For COVID-19 patients under 70, the meta-analysis finds an infection survival rate of 99.95%. A separate meta-analysis by other scientists independent of Dr. Ioannidis’ group reaches qualitatively similar conclusions. *Id.* at p. 5, ¶ 14.

“A study of the seroprevalence of COVID-19 in Geneva, Switzerland (published in *The Lancet*) provides a detailed age breakdown of the infection survival rate in a preprint companion paper: 99.9984% for patients 5 to 9 years old; 99.99968% for patients 10 to 19 years old; 99.991% for patients 20 to 49 years old; 99.86% for patients 50 to 64 years old; and 94.6% for patients above 65. *Id.* at ¶ 15.

“Those numbers are consistent with what the US CDC has reported. A US CDC report found between 6 and 24 times more SARS-CoV-2 infections than cases reported between March and May 2020. Correspondingly, the CDC’s estimate of the infection fatality rate for people ages 0-19 years is 0.003%, meaning infected children have a 99.997% survivability rate. For people ages 20-49 years, it was 0.02%, meaning that young adults have a 99.98% survivability rate. For people age 50-69 years, it was 0.5%, meaning this age group has a 99.5% survivability rate. Finally, for people ages 70+ years, it was 5.4%, meaning seniors have a 94.6% survivability rate. *Id.*, p. 6, ¶ 17.

“One segment – the elderly and others with severe chronic disease – faces a higher risk of mortality if infected (especially if unvaccinated). A second segment – typically non-elderly people – face a very low risk of mortality if infected and instead face much greater harm from lockdowns, school closures, and other non-pharmaceutical interventions than from COVID infection itself. The right strategy, then, is focused protection of the vulnerable population by prioritizing them for vaccination while lifting lockdowns and other restrictions on activities for the rest since they cause harm without corresponding benefit for the non-vulnerable.” *Id.*, p. 7, ¶ 19.

2. Vaccinated individuals are at least as likely as unvaccinated individuals to be shedding live virus.

“It has been found that vaccinated individuals are at least as likely as unvaccinated individuals to be shedding live virus. Data from studies indicate that

vaccinated and unvaccinated individuals infected with the Delta variant might transmit infection. Importantly, it has been shown that infectious SARS-CoV-2 is frequently found even in vaccinated persons.” *Id.*, p. 13, ¶ 27.

Also, the CDC recently reported in July that “new scientific data” indicated that vaccinated people who experienced breakthrough infections carried similar viral loads to the unvaccinated, leading the CDC to infer that vaccinated people transmit the virus at concerning levels.¹²

For example, 74% of cases in a Cape Cod outbreak in July occurred in vaccinated individuals, again demonstrating that the vaccines are not terribly effective when it comes to preventing infection.¹³ This forced the Director of the CDC, Rochelle Walensky, to admit that individuals vaccinated for COVID-19, while having less symptoms, can still become infected with and transmit the virus. Dr. Walensky admitted that “what [the COVID19 vaccines] can’t do anymore is prevent transmission.” After this admission, Wolf Blitzer asked Dr. Walensky if “you get covid, you’re fully vaccinated, but you are totally asymptomatic, you can still pass on the virus to someone else, is that right?” Dr. Walensky responded, “that is exactly right.”¹⁴

Differential treatment of the vaccinated and unvaccinated by WSU, then, is clearly not based on data or science.

3. Asymptomatic spread of COVID-19 is rare.

According to Dr. Bhattacharya, “the best evidence on how frequently asymptomatic disease spread occurs comes from a large meta-analysis of 54 studies from around the world of within-household spread of the virus—that is, from an infected person to someone else living in the same home (Madewell et al. 2020). This study represents the most comprehensive survey of the vast empirical literature on asymptomatic spread. At home, *of course*, none of the safeguards often recommended in public spaces outside of home (such as masking and social distancing) are typically applied. Because the study focuses on a single setting (household transmission), it is not subject to the same problems that other studies on this topic might have. In particular, by focusing on a homogenous setting where few safeguards exist, the estimate represents an upper bound on the frequency that someone positive for the virus but with no symptoms (and hence either pre-symptomatic or asymptomatic) may spread the virus to close contacts. The primary result is that symptomatic patients passed on the disease to household members in 18% of instances. In comparison, those infected but without symptoms (asymptomatic and pre-symptomatic patients) passed on the infection to household members in only 0.7% of instances. *Id.*, p. 19-20, ¶ 37.

“Asymptomatic individuals are an order of magnitude less likely to infect others than symptomatic individuals, even in intimate settings such as people living in

¹² See Joel Achenbach, CDC Reversal on Indoor Masking Prompts Experts to Ask, “Where’s the Data?” Wash. Post, July 28, 2021, [wapo.st/2THpmIQ](https://www.washingtonpost.com/health/cdc-reversal-on-indoor-masking-prompts-experts-to-ask-where-s-the-data-2021-07-28/) (last visited Oct. 26, 2021).

¹³ See Molly Walker, CDC Alarmed: 74% of Cases in Cape Cod Cluster Were Among the Vaxxed, MedPage Today, July 30, 2021, [bit.ly/2V6X3UP](https://www.medpagetoday.com/Infectious/COVID-19/74444) (last visited Oct. 26, 2021).

¹⁴ The Situation Room (@CNNSitRoom), Twitter (Aug. 5, 2021, 5:14 p.m.), <https://twitter.com/CNNSitRoom/status/1423422301882748929>.

the same household where people are much less likely to follow social distancing and masking practices that they follow outside the household. Spread of the disease in less intimate settings by asymptomatic individuals—including in the context of the WSU work environment—is likely to be even less likely than in the household.” *Id.*, p. 22, ¶ 43.

In other words, if Coach Rolovich isn’t symptomatic, he, like all other asymptomatic individuals, presents almost a 0% chance of infecting others. Mr. Chun clearly did not consider this fact in his decision to overrule the accommodation plans.

4. WSU can keep its employees and others safe if it does not mandate that all its employees be vaccinated.

“Can WSU keep its employees safe if it does not mandate that all its employees be vaccinated? *The answer is a definitive yes.*” *Id.*, p. 22, ¶ 44 (emphasis supplied). That is Dr. Bhattacharya’s expert opinion, derived from his personal scientific investigations, and his examination and analysis of a multitude of scientific studies.

“First and most obviously, WSU could adopt a robust sick policy, requiring that employees who have not been vaccinated and who show symptoms consistent with COVID-19 infection stay at home from work, returning to work only once they have had a negative COVID-19 PCR or antigen test result. This could be implemented, for instance, by requiring employees to complete a symptom self-check each day before coming to work. WSU would provide employees with a supply of inexpensive rapid antigen tests, which are easy to self-administer at home, provide results within 30 minutes, and are highly accurate for detecting whether a patient is infectious. A large number of lateral flow antigen tests have received Emergency Use Authorization (EUA) by the US Food and Drug Administration. Alternatively, WSU could require that any unvaccinated employees obtain those tests themselves to keep its own costs down. Employees who report COVID-19 like symptoms would be asked to send a picture of their positive test result to their manager or a WSU health official by phone or email to verify their result. A system that required the few employees who seek the vaccine exemption to provide this information to their manager each day before coming to work would be inexpensive—no online reporting system would be necessary. *Id.*, p. 22-23, ¶ 45.

“For this symptom checking policy to be effective in reducing the risk of disease spread, it must be the case that symptomatic employees are substantially more likely to infect others than employees who are infected (that is, have evidence of the virus in the nasopharynx), but who have no symptoms. Fortunately, the best empirical evidence shows that the probability that an asymptomatic individual will spread the disease is very low. And because the overwhelming majority of WSU employees will themselves be vaccinated, they face even less risk from any

of their asymptomatic, unvaccinated coworkers who receive an accommodation from WSU for religious or medical reasons of developing severe COVID symptoms.¹⁵ *Id.*, p. 23-24, ¶ 46.

"In addition, WSU could implement a program of weekly PCR or antigen testing as a condition of an employee's receiving an exemption. Many other organizations have implemented a testing regimen like this for all employees, including my home institution, Stanford University. Employees receiving an exemption could take the test in the workplace—there are versions of the test available that can be self-administered. Or employees could be required to purchase and take the test at home.^{16,17} *Id.*, p. 23-24, ¶ 46.

"Since its spread through the human population, the SARS-CoV-2 virus—an RNA virus—has been mutating, including some forms that are likely more transmissible than the original wild-type virus that emerged from Wuhan, China, in 2019. As of the date of this declaration, the Delta variant is the dominant form of the SARS-CoV-2 virus worldwide. The virus will continue to mutate as it continues to spread. However, the possibility of such a mutation does not alter the conclusion that accommodations can be allowed without risk to public safety. *Id.*, p. 24, ¶ 48.

"The first two accommodations discussed above would be equally effective against variants as they are against the original Wuhan version. That is because all variants to arise thus far produce symptoms that can be checked for, and can be identified through standard COVID testing. So regular symptom-checking and/or testing for those receiving medical or religious accommodations will detect the variant if it is present." *Id.* at ¶ 49.

¹⁵ President Schulz has said that nearly 90 percent of WSU employees and 97 percent of students are vaccinated. Chuck Culpepper, Washington State Football Coach Nick Rolovich Fired after Failing to Comply with Vaccine Mandate, Washington Post, Oct. 18, 2021, <https://www.washingtonpost.com/sports/2021/10/18/nick-rolovich-washington-state-fired-covid-mandate/>. See also Donald G. McNeil, Jr., How Much Herd Immunity Is Enough?, NY Times, Dec. 24, 2020 (updated Sept. 22, 2021), <https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html> ("Dr. Fauci noted, a herd-immunity figure at 90 percent or above is in the range of the infectiousness of measles. 'I'd bet my house that Covid isn't as contagious as measles,' he said.").

¹⁶ Coach Rolovich has been willing to abide by a daily testing protocol: he was doing so in August. See Scott Hanson, WSU in 'strict COVID management' after football coach Nick Rolovich's decision to not get vaccinated, Spokesman Review, Aug. 13, 2021, <https://www.spokesman.com/stories/2021/aug/13/wsu-in-strict-covid-management-after-football-coach/> ("Rolovich, meanwhile, is undergoing daily COVID-19 testing and wears a mask. Chun said the coach is adhering to all protocols.").

¹⁷ On August 4, the Governor's office was considering a "testing strategy option" of "allowing workers to opt-out of the vaccine in favor of weekly COVID-19 testing." But two days later this option was rejected. <https://www.q13fox.com/news/emails-state-sought-to-make-religious-vaccine-exemption-as-narrow-as-possible>. Upon information and belief, the Governor's office rejected this option because it understood that allowing a "testing strategy option" would make it easier for Coach Rolovich and other State employees with religious objections to demonstrate that they could work safely without receiving a COVID vaccine.

5. Variants do not affect the reasonableness of the COVID-recovery alternative discussed above.

“Variants likewise do not affect the reasonableness of the COVID-recovery alternative discussed above. The key point is that the mutant variants do not escape the immunity provided by prior infection with the wild-type virus or vaccination. This is true of the delta variant as well. In a study of a large population of patients in Israel, *vaccinated* people who had not been previously infected were 13 times more likely to experience a breakthrough infection with the Delta variant than patients who had recovered from COVID. Although reinfection can occur, people who have been previously infected by the virus are unlikely to have a severe outcome (hospitalization or death) after exposure to a variant virus. A variant circulating in the population thus poses little additional risk of excess mortality due to viral infection.” *Id.*, p. 25, ¶ 50.

6. Chun and WSU have provided no evidence that the safety measures already imposed on Coach Rolovich for over a year would not be adequate to protect himself and others if an accommodation was granted.

Coach Rolovich received an email from HRS at 4:29 p.m. on October 18, only a minute before the meeting with Chun, where Chun handed him a three-page letter of intent to terminate; the email stated that “the University has determined you cannot safely and effectively do your job without undue hardship to the University.” There was no disclosure of evidence relied upon by Chun and WSU in determining that Coach Rolovich could not safely and effectively do his job. Chun’s memorandums overruling the HRS Exemptions and EH&S proposed accommodations was equally bereft of any supporting scientific data.

In fact, Coach Rolovich had been safely and effectively doing his job since he arrived on the WSU campus. For the past year he has been following the safety protocols required of him by the University and Chun. During that time there has been no evidence to suggest that Coach Rolovich wasn’t safely and effectively doing his job. The same, of course, cannot be said of Mr. Chun who became infected with COVID at a donor event last summer. The University did not explain how the safety protocols Coach Rolovich followed for more than a year without incident would suddenly be ineffective, especially when almost every student and staff member at WSU has now been vaccinated.

Dr. Bhattacharya summarized the implications of the studies he has reviewed and cited: “Now that every American adult and teenager has free access to the vaccines, the case for a vaccine mandate is weaker than it once was. There is no good public health case for WSU to terminate employees who have a sincere medical or religious objection to vaccination. Since the successful vaccination campaign already protects the vulnerable population, the unvaccinated—especially recovered COVID patients—pose a vanishingly small threat to the vaccinated. They are

protected by an effective vaccine that dramatically reduces the likelihood of hospitalization or death after infections.” *Id.*, p. 29, ¶ 57.

Coach Rolovich, through Dr. Bhattacharya’s declaration, has produced compelling scientific evidence that the University should have granted him an accommodation. There is an accommodation for Coach Rolovich that WSU could have provided if it had simply taken the time to consider the facts and the science. Instead, WSU and Chun chose to ruin the lives of those who would not reject their faith by submitting to the governor’s mandate.

7. Chun was wrong to conclude that Coach Rolovich could not perform the essential functions of his job under the accommodations presented by HRS and EH&S: Coach Rolovich had been effectively doing so under the similar protocols for over a year.

In the undated correspondence responding to the EH&S accommodation plan, the reasons for denying the accommodation plan are essentially the same as those set forth in Chun’s October 13 memorandum denying the accommodation plan provided by HRS Exemptions. The bullet points in the undated correspondence are addressed below.

The following indicates a brief summary of some of Coach Rolovich’s response to Mr. Chun’s purported reasons for declining EH&S’ recommendations:

Coaching: Training, evaluating and developing student-athletes.

Frequent close physical proximity to and contact with others is an inherent part of coaching.

Response: Coach Rolovich has been doing all of this safely throughout the pandemic. Also, vaccinated coaches are required to wear masks and socially distance, though they often disregard both requirements.

Travel: Travel is a key component of team competition and recruiting.

The football team does travel by 737 charter for games; it also travels by bus to airports, hotels, and stadiums. Although social distancing may be maintained on a chartered 737 flight, it becomes exceedingly difficult on buses, and could require that a coach travel separately in between airports, hotels, and stadiums. Organizationally this is not practical as coaches are expected to travel and be with the team on road trips. This also creates a financial burden if a coach has to travel separately. Further, team meetings and meals while traveling often take place indoors with many student-athletes and coaches in attendance; travelling separately will limit these interactions and negatively impact relationships. WSU has little to no control over access to facilities used for such meetings and cannot control circulation or sanitization of such facilities. Managing team travel is a difficult process and it only be made more difficult by having to work to safely accommodate unvaccinated staff. We are concerned that travel under these circumstances cannot be safely and effectively accommodated.

Response: Coach Rolovich has been traveling without incident and without infecting anyone. The NCAA has recommended more buses for all teams to increase distancing. Meals during travel were all done according to the local health rules. The team has been accommodated the entire year. There have been no cases of COVID-19 this year due to travel. There has been only one positive case (which was discovered before training camp).

Recruiting: Recruiting is critical to the success of the Football Program and Athletics Department. Almost all recruiting travel is done via commercial flights. This means that unvaccinated coaches will be subject to seating arrangements, seat assignments etc. based on the private airlines. It is important to note that once an unvaccinated coach has taken a commercial flight they directly enter recruit homes, high schools or other training facilities. Recruiting remotely via technology or in person fully masked and socially distanced will have a negative impact on how WSU approaches recruits (and their families). Although it is difficult to estimate how many recruits and their families will be uncomfortable with unvaccinated visits, even a small decrease in recruit access by WSU coaching staff will have significant impact on the Football Program. Given WSU's location, relatively limited media exposure, and traditional role as the smallest program in the Pac-12, recruiting is critically important to any successful athletics program. A coach who is met with suspicion, hesitancy, or fear creates an undue hardship for the purposes of recruiting and cannot be accommodated.

Response: Coaches have not been on the road recruiting since the pandemic began (recruitment was permitted by the NCAA at summer camps, off-campus visits will be permitted November 28, 2021–January 13, 2022). As a result, there have been no opportunities to do home visits, and that is an NCAA rule. There have been multiple official visitors to the campus, with no concerns arising about Coach Rolovich's vaccination status. The only concern was with one family and that was about what WSU would do about my employment because Coach Rolovich had not taken the vaccine. The majority of comments from recruits and their families have been positive and respectful about what I had described at the time as my personal decision.

Donors: Donor Cultivation Is Critically Important and Requires in Person Contact. If donors are hesitant, fearful, or upset about an unvaccinated coach visiting them, that creates significant hardship for Athletics. WSU's unique location and donor base provides little margin for error; there are few mega-donors to help support the program. Athletics fund-raising has relied on moderate donations from a larger pool of donors. Any reduction in that group of people will have a significant impact on WSU. If WSU does lose one "mega" donor, it can have significant and lasting consequences to the Football Program, Athletics Department, and WSU. WSU has already lost significant donor commitments who have withdrawn or withheld donations based on the vaccination decisions of the football staff. Even if masked and socially distanced, the number of donors who will not engage with the program or staff regardless of accommodations is a

hardship WSU cannot afford. Note that donors are frequently older individuals who may be medically vulnerable to severe COVID-19.

Response: The majority of donor events that have taken place since the pandemic began have been done via Zoom. Rather than talk with donors about the importance of protecting and respecting the beliefs of its coaches, Mr. Chun and WSU continue to demonize the unvaccinated coaches, though science has confirmed that the vaccinated are as or nearly as risky to others as the unvaccinated.

Media: Coaches are expected to engage in all forms of local and national media. All coaches, but football coaches in particular, are high profile employees. Head coaches are generally contractually obligated to participate in media events related to the Football Program. This includes weekly radio shows, attendance at conference sponsored media days, regular interactions with sponsored media and regular news conferences. These duties are part of expanding the brand of the Football Program, the Athletics Department, and the University. However, because employees are not vaccinated, attendance at conference media day was done remotely, (which became a major story and embarrassment to WSU), the weekly Coach's show is now done remotely and has significant decline in attendance, and many media stories concerning the Football Program revolve around the unvaccinated status of the head coach (and assistant coaches).

Response: The majority of Coach Rolovich's interactions have been done via Zoom, but vaccinated coaches are also required to mask and socially distance indoors, which means in most cases Coach Rolovich had been interacting with media on the same terms as vaccinated coaches.

It is also important to note that there is abundant evidence that Mr. Chun's alleged concern about mask wearing and social distancing has been selectively focused on Coach Rolovich and his unvaccinated assistant coaches. A few examples are sufficient to make this point for the present:

On October 25, four days after firing Coach Rolovich, Mr. Chun was photographed indoors, unmasked, at a donor event. One reporter noted, "This is in violation of Inslee's reinstated indoor mask mandate. This isn't good optics for WSU. . . . [I]t's objectively poor optics for the director who announced Rolovich's termination to be seen violating a different Inslee COVID mandate."¹⁸

Mr. Chun likely did not think that a picture of him unmasked at a donor event would become public and make news. But WSU football knows it is on camera, it still flaunts the Governor's mandate. On the October 28 edition of the U.S. Bank

¹⁸ Jason Rantz, Rantz: Photo shows WSU's Pat Chun violating COVID policy after Rolovich firing, 770 KTTH, Oct. 25, 2021, <https://mynorthwest.com/3203295/rantz-wsu-photo-pat-chun-covid-rolovich-fired/>.

Washington State Coaches Show, coach Jake Dickert and players Chau Smith-Wade and Kaleb Ford-Dement appear on camera unmasked.¹⁹

The Governor's mandate and the WSU Athletics Department require all coaches and players to be masked when indoors, vaccinated and unvaccinated alike, when social distancing is not feasible. Yet on October 30, after the Arizona State game, Mr. Chun was filmed in the locker room in close contact with coaches and players, all of whom were unmasked.²⁰ This violated both the University's and host Arizona State University's masking policies.²¹

Every day provides new evidence of Mr. Chun's hypocrisy. Earlier today it was reported that Mr. Chun and his wife have been "permanently trespassed" from two Pullman businesses following allegations of threatening behavior toward Pullman City Councilor Pat Sorensen.²² According to the police report, Mr. Chun and his wife showed up at Sorensen's place of business. Mr. Chun was upset with Sorensen because his daughter had posted a video online of a party at the Chun residence where the hosts and their guests were not wearing masks. Mr. Chun got aggressive with Sorensen in front of his daughter, yelling, "you are a f—" and "do you know how many people f— hate you."²³ Mr. Chun threatened to "destroy" Sorensen. Sorensen told police he felt threatened and that he was afraid Mr. Chun would "become physical" if Sorensen got up from his desk.

Like political leaders hosting large gatherings at the French Laundry in violation of safety guidelines, or who take off their masks as soon as the group photo opportunity is over, Mr. Chun has shown that he cares more about appearances and his reputation than public health. These incidents provide even further evidence that Mr. Chun was not a neutral decisionmaker and that the University's alleged health concerns are a pretext for its illegal discrimination against Coach Rolovich and his assistant coaches.

Integration into Institution. WSU is an R-1 research university, with a medical school, school for global health, and millions of dollars in science-based research funding.

¹⁹ WSUCougarAthletics, *WSU Football: U.S. Bank Coaches Show with Jake Dickert 10/28/21*, YouTube (Oct. 28, 2021), <https://www.youtube.com/watch?v=D-PbZgTiAmI>.

²⁰ Washington State Football (@WSUCougarFB), Twitter (Oct. 30, 2021, 5:20 p.m.), <https://twitter.com/wsucougarfb/status/1454589044147441664>.

²¹ Arizona State University, Implementation of ASU Face Cover Policy, <https://www.asu.edu/about/fall-2021> (last visited Nov. 2, 2021) ("face coverings will be required in certain indoor settings, i.e., where distancing may not be possible").

²² Report: Chun, wife trespassed from businesses: Pullman City Councilor Al Sorensen tells police that WSU AD and wife came to his business and threatened him, *The Lewiston Tribune*, Nov. 2, 2021, https://lmtribune.com/sports/report-chun-wife-trespassed-from-businesses/article_f5b69a55-5fce-52c6-a99c-d0f411ab5086.html.

²³ Simon Gibbs, Washington State athletic director Pat Chun issued trespass order after alleged profanity-ridden tirade, *On3*, Nov. 2, 2021, <https://www.on3.com/college/washington-state-cougars/news/pat-chun-washington-state-cougars-cited-police-report-harrasment-tresspassing-civil-issue/>.

Athletics is an important part of the WSU experience, and the Head Football Coach's contract requires him to "Integrate the Football program into the whole spectrum of academic life to complement the University and its mission in the state and community." The damage to the mission and reputation of the University posed by this situation cannot be understated, nor can it be resolved by accommodation.²⁴

Response: It is decidedly unclear how the exercise of a First Amendment right by an employee can be seen as inflicting damage to the mission and reputation of the University. Termination on those grounds is retaliatory and illegal. Surely, the better argument is that at a university where the unfettered exchange of ideas should be paramount, coaches and others who act according to their faith on such an important question are truly integrating into the whole spectrum of academic life to complement the University and its mission in the state and the community. That is, unless the "whole spectrum of academic life" at WSU means thinking only approved thoughts, and acting only according to WSU's approved thought mandate.

E. Employers Cannot Use Alleged Reputational Damages and Others' Biases to Excuse their Duty to Accommodate Religious Exercise.

What remains of the University's "undue burden" argument is its claim that its faculty and donors would be upset, and its reputation harmed, if it accommodated religious exercise in this instance. Courts give employers considerable latitude in making "undue burden" determinations." But that latitude has limits and the University has exceeded them.

The EEOC's recent guidance on COVID vaccine mandates provides examples of what employers may consider in judging whether accommodating religious objections to a vaccine mandate would impose an "undue burden."²⁵

First, employers may consider "direct monetary costs." The employer may consider "administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes, or infrequent or temporary payment of premium wages (e.g., overtime rates)." It cannot just tally costs in the abstract but must look at "the identifiable cost in relation to the size and operating costs of the employer, and the

²⁴ Mr. Chun's posture in October contradicts statements he made in August. *See, e.g.*, Scott Hanson, WSU in 'strict COVID management' after football coach Nick Rolovich's decision to not get vaccinated, Spokesman Review, Aug. 13, 2021, <https://www.spokesman.com/stories/2021/aug/13/wsu-in-strict-covid-management-after-football-coac/> ("WSU athletic director Pat Chun, who is vaccinated, made it clear Wednesday that he backs his coach, saying Rolovich is the right person for the job despite the two being diverged on the vaccine decision." "Chun said the coach is adhering to all protocols.").

²⁵ EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, at L (last updated Oct. 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>. This COVID-19 specific guidance incorporates by reference the more general EEOC Compliance Manual on Religious Discrimination, Jan. 15 2021, available at <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>.

number of individuals who will in fact need a particular accommodation.” Here and throughout, the EEOC supports its guidance with extensive footnotes to caselaw that work out these strictures in more detail.

Second, employers may consider an accommodation’s “burden on the conduct of the employer’s business.” But again, employers cannot just consider any inconvenience. The EEOC limits this consideration by providing specific examples, such as: “the risk of the spread of COVID-19 to other employees or to the public” [addressed above]; and “diminished efficiency,” from redistributing “the accommodated employee’s share of . . . work.”

Finally, the EEOC cautions that employers may not consider “speculative hardships when faced with an employee’s religious objection but, rather, should rely on objective information”:

An employer cannot rely on hypothetical hardship when faced with an employee’s religious obligation that conflicts with scheduled work, but rather should rely on objective information. A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

In this case, the University has repeatedly relied on alleged burdens that EEOC guidance and caselaw preclude employers from bringing into the “undue burden” analysis. For example, Mr. Chun’s memorandum rejecting EH&S’ recommendations relies on the following:

“WSU has already lost significant donor commitments who have withdrawn or withheld donations based on the vaccination decisions of the football staff.”

“[B]ecause employees are not vaccinated, attendance at conference media day was done remotely, (which became a major story and embarrassment to WSU), the weekly Coach’s show is now done remotely and has significant decline in attendance, and many media stories concerning the Football Program revolve around the unvaccinated status of the head coach (and assistant coaches).”

“The damage to the mission and reputation of the University posed by this situation cannot be understated, nor can it be resolved by accommodation.”

State officials have also made similar complaints in the media over the past few months. For example:

“My understanding of requiring health care and long-term care provider employees to get vaccinated is to protect patients/residents . . . ,” [Senior Assistant Attorney General Eric] Sonju wrote. “However, for executive cabinet agency employees, the purpose really is to get vaccine numbers up and having the state lead by example.”²⁶

²⁶ Brandi Kruse, Emails: State sought to make religious vaccine exemption ‘as narrow as possible,’ FOX 13 Seattle, Aug. 24, 2021, <https://www.q13fox.com/news/emails-state-sought-to-make-religious-vaccine-exemption-as-narrow-as-possible>.

Another article quotes President Schulz:

Rolovich's resistance frustrated campus leaders, including Schulz. . . . "Certainly we've been in the national media again and again and again over Coach Rolovich's particular stance on vaccines and his personal decision whether or not to be vaccinated," Schulz said. "It would be naïve of me to say this wasn't affecting the perception of Washington State University with prospective students, with donors, with lots of people around."²⁷

An October 11 piece in the Seattle Times states that Coach Rolovich's religious stance had "created an awkward situation for Washington State, an R1-level research institution (highest classification) with a medical school," not because Coach Rolovich posed an actual health risk but because he was "the face of the university's highest-profile entity." In President Schulz's words,

At most universities, people pay attention to what the university president, the football coach, the (men's) basketball coach and the athletic director have to say — that's just the reality. . . .

People look at them for leadership, because they're highly visible and highly compensated. It doesn't help when you have people who are contrary to the direction we're going.²⁸

Finally, last week ESPN published a long-form piece that promised to tell "the story of those few months and especially the chaotic final days, including never-before-told details of the battle between Rolovich and Washington State over his vaccination status."²⁹ The article interviewed several University leaders, but none describe the problem created by Coach Rolovich's religious exemption request as a public health issue—it was a "public relations issue."³⁰

The reporter interviewed Dr. Guy Palmer, "a world-renowned WSU regents professor of pathology and infectious diseases" and asked him why Coach Rolovich's religious stance "didn't sit nearly as well among the faculty":

"I think what would have been the broadest response of the faculty is embarrassed for the university," Palmer said. "Especially because they've launched a new medical school in the last several years. We've gotten medicine, nursing,

²⁷ Billy Witz, Washington State Fires Football Coach Over Vaccine Refusal, NY Times, Oct. 18, 2021, <https://www.nytimes.com/2021/10/18/sports/ncaaf-football/nick-rolovich-fired-covid-vaccine-mandate.html>.

²⁸ Jon Wilner, Here's the vaccine exemption questionnaire that may determine WSU coach Nick Rolovich's job status, Seattle Times, Oct. 12, 2021, <https://www.seattletimes.com/sports/wsu-cougar-football/heres-the-vaccine-exemption-questionnaire-that-may-determine-wsu-coach-nick-rolovichs-job-status/>.

²⁹ Kyle Bonagura, Inside Nick Rolovich's downfall at Washington State over the COVID-19 vaccine, ESPN, Oct. 27, 2021, https://www.espn.com/college-football/story/_/id/32459767/inside-nick-rolovich-downfall-washington-state-covid-19-vaccine.

³⁰ *Id.*

pharmacy—you're building out as a health sciences university, and then you have a high-profile individual sending a different message."³¹

To prove the point, a WSU athletics spokesperson told ESPN about the difference that the University's refusal to accommodate Rolovich had made. He was not relieved that the University was now a safer place for players, coaches, and donors. Rather, he bragged that denying Rolovich's religious exemption has "proved successful on the fundraising front. The athletic department received \$3.5 million in donation pledges."³²

In sum, the University is claiming the legal right to refuse to accommodate religious exercise because it has concluded that doing so would hurt "donor commitments," would cause "embarrassment," would "damage" its "reputation," would set the wrong kind of "example," it would send the wrong "message," and would "create[] an awkward situation."

As President Schulz put it, the University cannot let the "the face of the university's highest-profile entity" be someone with unpopular religious convictions. That would be "contrary to the direction we're going."

These public statements highlight two serious problems with the University's denial of Rolovich's religious exemption. First, they show that in making its decision, the University impermissibly relied on perceived public hostility toward religious objectors. Civil rights laws and constitutional protections would be worthless if employers were allowed to use concerns and predictions of this nature to excuse them from accommodating sincere religious beliefs.³³ To allow the University to do so here would set a terrible precedent that would have repercussions throughout the law.

Second, these public statements show that in denying Rolovich an exemption, the University's main goal was not to ensure health and safety, but to compel what it (and much of the public) viewed as fundamentally expressive conduct: "lead[ing] by example" and "send[ing] a message," as "a high-profile individual," consistent with the preferred messaging of the University and the State. But "citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 573 U.S. 228, 231 (2014). While public employers have an interest "in controlling speech made by an employee in his or her professional capacity,"

³¹ *Id.*

³² *Id.*

³³ See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) ("[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."); *E.E.O.C. v. St. Anne's Hosp. of Chi., Inc.*, 664 F.2d 128, 133 (7th Cir. 1981) ("[T]he animus against which the Act was directed should not be permitted to undermine and deter compliance with the Act."); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1066-67 (D. Ariz. 1999) (concluding that "potential lost revenue does not justify [an employer's] sex-based hiring practice" despite customer preferences and noting that "economic considerations are virtually never a factor" in determining whether sex-based hiring is permitted based on Title VII's bona fide occupational qualification exception).

Garcetti v. Ceballos, 547 U.S. 410, 422 (2006), no reasonable interpretation of Rolovich’s job description would include the duty to lead a public health campaign by personal example. By publicly and unequivocally framing Rolovich’s vaccination status as a matter of expressive conduct, the University unconstitutionally sought to compel him to speak on a matter outside his professional capacity. *See id.*

* * *

WSU and Mr. Chun had a choice when Coach Rolovich raised a religious objection to the Governor’s vaccine mandate. They could have given him a fair hearing, and then initiated a dialogue to discuss with Coach Rolovich, in light of the best science, how to accommodate his religious exercise. But instead, they ran roughshod over their policies and Coach Rolovich’s rights because they saw his religious beliefs as an embarrassment, and Mr. Chun made sure he inserted himself to make sure the process reached its preordained conclusion. The “reputational” damage that WSU has allegedly suffered was self-inflicted, but the reputational damage suffered by Coach Rolovich was caused by the University’s and Mr. Chun’s bad faith actions throughout the entire process.

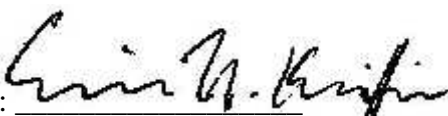
Dated this 2nd day of November, 2021.

Law Office of Brian Fahling

By: 

Brian Fahling
Attorney for Nicholas Rolovich

Lewis Roca

By: 

Eric N. Kniffin, Special Counsel
Attorney for Nicholas Rolovich

cc: President Kirk Schulz
Office of the President
Washington State University
PresidentsOffice@wsu.edu

Danielle Hess
Chief Counsel
Washington State University
danielleh@wsu.edu

ATTACHMENTS